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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

**KILLER BURGER, INC.**, an Oregon  
corporation,

Plaintiff,

v.

**ROCK AND ROLL CHILI PIT, INC.**, an  
Oregon corporation; **MARK MCCRARY** and  
**ROBIN MCCRARY**, husband and wife,

Defendant.

**Case No.** \_\_\_\_\_

**COMPLAINT**

(Trademark: Lanham Act (15 USC §1125),  
ORS Chapter 647, Common Law; and  
Breach of Contract)

**JURY TRIAL DEMANDED**

For its complaint, plaintiff Killer Burger, Inc. (“Killer Burger”) alleges:

**INTRODUCTION**

1.

This case is about the defendants’ blatant and obvious violations of Killer Burger’s proprietary rights. It is also about the McCrary defendants’ personal vendetta against Killer

Burger's majority owner, Thomas "TJ" Southard. Killer Burger is the most popular burger restaurant in Portland, Oregon. In 2014, readers of *The Oregonian* voted Killer Burger as having the "Best Burger" in the Portland area. Killer Burger likewise won "Best Burger" in 2015 and 2017 following reader surveys at portlandfoodanddrink.com. The restaurant's popularity has continued to grow, and there are now ten Killer Burger restaurants in Oregon. Defendant Mark McCrary is a former owner of Killer Burger who ceased being involved with the company in 2016. His new restaurant business, which he and his wife, defendant Robin McCrary, own and operate through defendant Rock and Roll Chili Pit, Inc., is currently using and advertising two burgers which were stolen straight from the Killer Burger menu. These two stolen burgers have the same names and ingredients as Killer Burger's "Epic" and "Black Molly." When defendants opened their store in April 2017, an article in the Willamette Week newspaper noted that the similarities between Killer Burger's business and defendants' new store were "suspiciously hilarious," but there is nothing funny about it. The defendants are stealing from Killer Burger. They should be stopped and must be made to pay.

## PARTIES

### 2.

Plaintiff Killer Burger, Inc. is an Oregon corporation with its principal place of business in Portland, Oregon. The company owns and operates a number of hamburger restaurants in Oregon and Washington under the name "Killer Burger".

### 3.

Defendant Rock and Roll Chili Pit, Inc. is an Oregon corporation with its principal place of business in Portland, Oregon. It owns and operates a restaurant called "Rock and Roll

Chili Pit” (“RRCP”). RRCP is located only a few blocks from Killer Burger’s anchor store in downtown Portland.

4.

Defendants Mark McCrary and Robin McCrary are husband and wife. Mark McCrary is the President of Rock and Roll Chili Pit, Inc. Robin McCrary is the Secretary of the company. The McCrarys reside in Oregon.

### **JURISDICTION AND VENUE**

5.

This Court has federal question jurisdiction over this action under 28 USC §1338 in that Killer Burger’s federal claims arise out of 11 USC §1125, known commonly as the Lanham Act. This Court has supplemental jurisdiction over Killer Burger’s state-based claims under 28 USC §1367. This Court has personal jurisdiction over all defendants because the corporate defendant is incorporated under the laws of Oregon with its principal place of business in Oregon, and the individual defendants reside in Oregon. Venue is proper in this District and Division under 28 USC §1391 because a substantial part of the events giving rise to this action occurred in Portland, Oregon.

### **GENERAL ALLEGATIONS OF FACT**

6.

Killer Burger was formed in 2010. Its restaurants feature unique hamburgers with distinctive qualities presented in a “hip” atmosphere. The setting is casual, with rock and roll music playing in the background, and the food is served in baskets. Two of Killer Burger’s most popular hamburgers include the “Peanut-Butter-Pickle-Bacon” burger, which features

pickles, bacon and a special peanut butter sauce, and the “Jose Mendoza”, which includes Killer Burger’s own roasted green chilies. The restaurants appeal to a varied market, including lunchtime crowds, families, college students, dinner time customers, and late-night clientele. Customer comments included in a Marketing Analysis and Recommendations report prepared in May 2016 (the “Marketing Report”) reveal a loyal following who consider Killer Burger to be a culture and experience as much as a place to eat.

7.

Two additional items popular on Killer Burger’s menu are the “Epic” and the “Black Molly.” The Epic includes pulled pork, bacon and coleslaw. The Black Molly includes a smokey house sauce, grilled onions and house-brined roasted green chilies.

8.

All of the hamburgers referenced above, including the Epic and the Black Molly, and others, have been featured on Killer Burger’s menu and in its advertising for many years. They have loyal customer followings and are the subject of numerous print journalism pieces and internet postings. Although they are not presently featured on Killer Burger’s menu, the Epic and Black Molly hamburgers are included in plaintiff’s rotating menu system. They were removed in Spring 2017 and are scheduled to return to Killer Burger’s menu on September 1, 2017.

9.

In 2010, the principal shareholders of Killer Burger were TJ Southard and defendant Mark McCrary. Mark McCrary parted ways with the company in early 2016 pursuant to the terms of a contract called a Stock Redemption Agreement. As part of that agreement, Mark

McCrary agreed to continue to be bound by the non-disclosure provisions of the 2015 stockholders' agreement. Those provisions prohibit Mark McCrary from disclosing any information he accessed while a shareholder if he knew or should have known that Killer Burger was treating the information as confidential, unless he had specific prior written authorization or in the interests of Killer Burger. The recipes for the "Black Molly", "Epic", and Killer Burger's peanut-sauce were confidential information.

10.

The Marketing Report included a "Social Media Fan Survey" which listed comments made by people from various social media websites. The vast majority of the comments were positive regarding Killer Burger. One such comment said: "Just wish the Black Molly could be made "Girlie" size. Must be a technical issue. Love KB though. Glad to have you in Sellwood." Another comment said: "Love the Jose Mendoza, barnyard and epic...And the classic rocks as well."

11.

Some negative comments in the Marketing Report, however, were clearly made by the McCrarys or those associated with them, with many comments directed at TJ Southard in particular. The comments included as follows:

"Everything was wonderful until you got rid of the McCrarys and Anna and the others left. I will NEVER come back, and I tell all my friends what went down. Not very Christian behavior TJ!"

"F[\*\*\*] you TJ."

"I think it is crap what you did to the McCreary's [sic] and I hope that you suffer the worst that karma has to offer. When they open a new burger restaurant they will run you out of the business. Good luck!"

“Tell TJ he is a puke.”

“This place was amazing because of the Killer owners and Killer staff but since you got rid of all of them it’s just a shitty mess! Boycotting you forever! F[\*\*\*] YOU TJ!”

12.

Most customers do not know TJ Southard or are not aware of his ownership interest in Killer Burger. The above negative comments could only have been made by people with inside information regarding Killer Burger, which would be the McCrarys themselves, their family members or their associates.

13.

The McCrarys opened RRCP in April 2017. The restaurant copies many of Killer Burger’s themes by selling burgers in a “rock and roll” atmosphere. As alleged above, RRCP is located less than two blocks from Killer Burger’s largest and most successful restaurant in downtown Portland. Comments by the McCrarys on social media leave no doubt they are trying to profit off of Killer Burger’s marks, recipes, business, goodwill and clientele. One such comment stated: “They’re the founders of Portland’s beloved Killer Burger, and they’ve opened a place – the Rock and Roll Chili Pit, a new burgers, beers and live music venue located just a block-and-a-half north of their former business.”

14.

Moreover, RRCP’s menu includes the two stolen hamburgers: the Epic and the Black Molly. The RRCP hamburgers have the same ingredients as the Epic and Black Molly hamburgers served at Killer Burger. The McCrarys did not even bother to change the names of

these hamburgers. The McCrarys are not hiding the fact that they are knowingly, willfully and intentionally serving the Killer Burger's proprietary products.

15.

Another post on social media actually includes a video Mark McCrary himself biting into a hamburger. Above the video posting is the statement: "He designed it for his previous burger place. **He brought it with him to his new burger place.** It's not Killer. It's Rock and Roll. It's EPIC." (emphasis added). In sum, defendants began using Killer Burger's marks after the marks became famous. Defendants' use is likely to cause dilution of Killer Burger's famous marks. Their use of Killer Burger's marks was done with the intent to cause confusion or mistake or to deceive.

### **FIRST CLAIM FOR RELIEF**

(Unfair Competition – Lanham Act)

16.

Killer Burger hereby incorporates the allegations of the preceding paragraphs of this Complaint as if fully set forth herein.

17.

Defendants' knowing, willful and intentional use of Killer Burger's trademarks, specifically including defendants' use of the Epic and Black Molly hamburgers, to promote, market and sell their products constitutes unfair competition under 15 USC § 1125(a). Defendants' use of Killer Burger's trademarks is likely to cause confusion, mistake and deception among consumers as to the origin, sponsorship or approval of Killer Burger's products and services.

18.

Defendants' wrongful conduct as alleged herein creates a likelihood of injury to Killer Burger's business reputation because Killer Burger customers will be misled into believing that RRCP is affiliated with or related to it and that defendants have the approval of Killer Burger to use its trademarks. Any adverse reaction by the public to defendants' use of Killer Burger's products and marks or the nature of RRCP's business will injure the business reputation of Killer Burger and the goodwill it enjoys in connection with its trademarks. Further, customers who might otherwise purchase an "Epic" or "Black Molly" from Killer Burger may instead purchase the stolen product from RRCP.

19.

This is an exceptional case and Killer Burger is entitled to recover, among other things, treble damages and reasonable attorney fees pursuant to 15 USC §1117(a).

## **SECOND CLAIM FOR RELIEF**

(Violation of ORS Chapter 647)

20.

Killer Burger hereby incorporates the allegations of the preceding paragraphs of this Complaint as if fully set forth herein.

21.

Defendants' knowing, willful and intentional misuse of Killer Burger's marks is likely to cause confusion or mistake or to deceive as to the origin of Killer Burger's goods or services, and to dilute the distinctive quality of the "Epic" and "Black Molly" marks. Defendants' conduct has violated and will continue to violate ORS 647.107. The "Epic" and



“Black Molly” marks have acquired a distinctive quality of favorable associational value such that Defendants’ use of those marks must be enjoined in order to prevent the diminution of Killer Burger’s advertising tools among consumers. Further, defendants have acted in bad faith, with knowledge, and vexatiously, wantonly or for oppressive reasons. Defendants’ actions have caused irreparable harm to Killer Burger’s goodwill and business reputation. Killer Burger is entitled to recover not only compensatory damages but three times the sum of the defendants’ profits and the Killer Burger’s damages and reasonable attorney fees pursuant to ORS 647.095, 647.105, and 647.107.

### **THIRD CLAIM FOR RELIEF**

(Violation of Common Law rights)

22.

Killer Burger hereby incorporates the allegations of the preceding paragraphs of this Complaint as if fully set forth herein.

23.

Defendants’ misconduct as alleged above constitutes unfair competition and infringement of Killer Burger’s trademark rights. Defendants’ have infringed on Killer Burger’s marks with the intent to deceive the public into believing the goods sold by defendants are made by, approved by, sponsored by or affiliated with Killer Burger’s products and services. Defendants’ acts were committed with the intent to pass defendants’ goods as the goods of Killer Burger, and with the intent to deceive and defraud the public.

#### **FOURTH CLAIM FOR RELIEF**

(Breach of Contract, against Defendant Mark McCrary only)

24.

Killer Burger hereby incorporates the allegations of the preceding paragraphs of this Complaint as if fully set forth herein.

25.

Mark McCrary breached the stock redemption agreement when he disclosed the recipes for the “Epic”, “Black Molly” and peanut sauce to RRCP.

26.

Killer Burger has been damaged by Mark McCrary’s breach of contract. Killer Burger is entitled to recover its damages on account of that breach.

#### **PRAYER FOR RELIEF**

WHEREFORE, Killer Burger prays for judgment against all defendants as follows:

- A. Compensatory damages in an amount to be determined at trial;
- B. Damages amounting to defendants’ profits from their sales related to the use of the trademarks and confidential information;
- C. Damages amounting to the fair royalty value for the use of the confidential information and trademark during the period of misappropriation;
- D. Treble damages;
- E. An injunction against defendants, and their respective employs and agents, (1) prohibiting them from producing, preparing, marketing, advertising, promoting, or offering for sale the “Epic” and “Black Molly” hamburgers; and (2) requiring them to issue corrective

advertising to correct the public misconception they have created and disseminate the truth: that the Epic and Black Molly are exclusive Killer Burger products and that defendants are not entitled to and will no longer feature Killer Burger's Epic and Black Molly hamburgers, including but not limited to corrective advertising on any websites and other social media, including Facebook;

- F. Reasonable attorney fees;
- G. Costs and disbursements; and
- H. Such other relief as the Court deems just and equitable.

DATED this 4<sup>th</sup> day of August, 2017.

s/ S. Ward Greene

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